No. 232

In the Supreme Court of the United States

OCTOBER TERM, 1966

UNITED STATES OF AMERICA, PETITIONER

v.

DAVID PAUL O'BRIEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

THURGOOD MARSHALL,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case, entered on April 10, 1967.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 9-15), and its opinion on rehearing (App. B, *infra*, pp. 17-19), are not yet reported.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, p. 16) was entered on April 10, 1967, and a petition for rehearing was denied on April 28, 1967 (App. B, *infra*, pp. 17-19). On May 3, 1967, Mr. Justice Fortas extended the government's time for filing a petition for a writ of certiorari to June 9, 1967. We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the 1965 amendment to 50 U.S.C. App. 462(b)(3), making it a crime knowingly to destroy or mutilate a Selective Service certificate, is unconstitutional.

STATUTE INVOLVED

Section 12(b)(3) of the Universal Military Training and Service Act, 50 U.S.C. App. 462(b)(3), as amended by 79 Stat. 586 (1965), provides:

> (b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title (sections 451, 453, 454, 455, 456 and 458-471 of this Appendix), or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or

representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title (said sections), or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title (said sections) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury. [Amendment italicized.]

STATEMENT

After a jury trial, respondent was convicted in the United States District Court for the District of Massachusetts of knowingly mutilating and destroying his Selective Service Registration Certificate, in violation of Section 12(b)(3) of the Universal Military Training and Service Act, 50 U.S.C. App. 462(b)(3), as amended in 1965 by 79 Stat. 586. On July 1, 1966, he was sentenced under the Federal Youth Corrections Act, 18 U.S.C. 5010(b), to be placed in the custody of the Attorney General for a maximum of six years for supervision and treatment.

The evidence showed that on the morning of March 31, 1966, respondent and three others burned small white cards (assumed to be their draft cards) on the steps of the South Boston Courthouse (R. 8-9, 11-12, 15, 17). A sizable crowd which included several F.B.I. agents witnessed the event. Immediately following the burnings, members of the crowd began attacking respondent and his companions. One F.B.I. agent ushered respondent to safety inside the courthouse. Shortly thereafter, respondent was interviewed by that agent and a second agent. Respondent (who had been advised of his rights) stated that he had burned his Selective Service Registration Certificate because of his beliefs, knowing that he was violating federal law. He showed the agents, and permitted them to photograph, the "charred remains" of the certificate (R. 11-12, 17; see R. 59-60). Respondent, who represented himself at trial, did not contest the facts. Before trial, counsel had filed on

his behalf a motion to dismiss the indictment on the ground that the 1965 amendment to 50 U.S.C. App. 462(b)(3), making it a crime to knowingly mutilate or destroy one's draft card, was unconstitutional. That motion was overruled (R. 65-66).

On appeal, the First Circuit held that the 1965 amendment was unconstitutional. It noted that at the time the law was enacted a regulation of the Selective Service System (32 C.F.R. § 1617.1) required Selective Service registrants to keep their Registration Certificates in their "personal possession at all times" and that wilful violation of the regulation was a crime. 50 U.S.C. App. 462(b)(6). Although conceding that the regulation had a legitimate purpose, the court of appeals reasoned that no valid purpose was served by the 1965 amendment, since conduct punishable under it was also punishable, and to the same degree, under the regulation. The court found that, in light of the prior regulation, the statute must have been "directed at public as distinguished from private destruction" (App. A, *infra*, p. 13), and concluded that, in thus "singling out persons engaging in protest for special treatment" (*ibid.*), the law violated the First Amendment. The court ruled, however, that respondent's conviction should be affirmed under the statutory provision making violation of the regulation a crime. The court deemed such violation a lesser included offense of the offense defined by the 1965 amendment, noting that the proof at trial had clearly established wilful non-possession by respondent of his certificate. Nevertheless, it ordered the case remanded for resentencing in light of its opinion.

Respondent filed a petition for rehearing. The court denied it in an opinion (App. B, *infra*, pp. 17-19) in which it reiterated its view that respondent could properly be convicted of the crime of wilful non-possession of a certificate on the facts of this case, even though there might be instances when the particular mode of mutilation of a certificate would not infringe the requirement of personal possession.

ARGUMENT

1. The Court of Appeals for the First Circuit held in this case that the Act of Congress making the knowing mutilation or destruction of a Selective Service certificate a crime abridges the First Amendment, and is therefore invalid. The statute has been upheld in two other circuits. *United States* v. *Miller*, 367 F. 2d 72 (C.A. 2), certiorari denied, 386 U.S. 911; *Smith* v. *United States*, 368 F. 2d 529 (C.A. 8). This conflict among the circuits as to the validity of a federal criminal statute that is being actively enforced should be promptly resolved. To be sure, the court of appeals, relying on a different statutory provision, affirmed the conviction in this case, but it set aside the sentence on the basis of its constitutional ruling; its judgment is therefore ripe for immediate review.

2. The ruling is a questionable one. If Congress may require a draft registrant to carry his draft card at all times on pain of criminal sanctions—as the court below conceded—it would appear that it may also forbid him to destroy or mutilate his card.

The purposes served by the requirement of possession (*e.g.*, proof that the holder has registered for the draft) can be as thwarted by mutilation or destruction as by mere non-possession.

To be sure, prohibiting mutilation or destruction may inhibit draft-card burning as a symbolic or expressive gesture of protest,[1] but no more so than the admittedly valid prohibition against non-possession. In our view, a statute that serves a legitimate purpose is not invalidated by the fact that it incidentally restricts a mode of dissent or expression that is not speech in any traditional sense. The court of appeals reasoned that the statute had no legitimate purpose because it forbade nothing that was not within the scope of the existing prohibition against wilful non-possession. However, as the court itself recognized in its opinion on rehearing, one can readily posit instances where knowing mutilation of a draft card, although rendering the card useless for the purposes for which it is designed, would not result in loss of possession under the regulation, and hence would be covered only under the 1965 amendment.

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[1] The statute, of course, forbids private or clandestine, as well as public, mutilation or destruction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JUNE 1967.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 6813

DAVID PAUL O'BRIEN, DEFENDANT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
For the District of Massachusetts

Before ALDRICH, *Chief Judge,*
MCENTEE and COFFIN, *Circuit Judges.*

Marvin M. Karpatkin, with whom *Howard S. Whiteside, Melvin L. Wulf, Henry P. Monaghan* and *Eleanor Holmes Norton* were on brief, for appellant.

John Wall, Assistant U. S. Attorney, with whom *Paul F. Markham,* United States Attorney, was on brief, for appellee.

April 10, 1967

ALDRICH, *Chief Judge.* The defendant was indicted on the charge that he "willfully and knowingly did

mutilate, destroy and change by burning . . . [his] Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App. United States Code, Section 462(b)." Section 462(b) is composed of six numbered subsections, none of which was identified except as above. The following provisions are here pertinent.

> "(3) who forges, alters, *knowingly destroys, knowing mutilates,*[1] or in any manner changes any such certificate . . ."
>
> "(6) who knowingly violates or evades any of the provisions of this title (said sections [451-454, 455-471 of this Appendix]) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer or possession of such certificate."

A regulation required that possession of a certificate be maintained at all times. 32 C.F.R. § 1617.1. The penalty for violation of all sections listed was a fine, not to exceed $10,000, or imprisonment for not more than five years, or both.

The defendant moved to dismiss the indictment, asserting violation of the First and a number of other amendments. The motion was denied. Thereafter he was tried to a jury. At the trial he conceded that he had burned his certificate, and raised only his constitutional defenses. Upon conviction and sentence[2] he appeals. His position here is that his conduct, publicly done to express his disapproval of the draft and all that it represented, was a lawful exercise of free speech.

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[1] The italics are ours. See *infra*, fn. 4.

[2] Defendant was sentenced under the Youth Correction Act, 18 U.S.C. § 5010(b) (six years).

Subsection (b) (3) was originally directed to forgery and fraud. In 1965 some young men of the same mind as the defendant engaged in the same conduct, to wit, the public burning of "draft cards," which he has now imitated.[3] The reaction in Congress was plain. Despite the fact that subsection (b) (6) already made it an offense to part with possession of a draft card, Congress made it a separate offense if loss of possession was effected in a particular manner. The words "knowingly destroys, knowingly mutilates" were added to subsection (b) (3).[4]

In upholding the validity of this amendment against the same constitutional attack that is presently made, the court in *United States* v. *Miller*, 2 Cir., 1966, 367 F.2d 72, *cert. den.* 2/13/67, said, at 77,

> "What Congress did in 1965 only strengthened what was already a valid obligation of existing law; *i.e.*, prohibiting destruction of a certificate implements the duty of possessing it at all times."

In support of this assertion the court demonstrated the reasonableness of requiring registrants to be in possession of their cards, and with this demonstration we do not quarrel. *United States* v. *Kime*, 7 Cir., 1951, 188 F.2d 677, *cert. den.* 342 U.S. 823. With all respect, however, the existence of prior law requiring registrants to possess their cards at all times does not support the amendment. On the contrary, given that law, we can see no proper purpose to be

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[3] We are not in a position to say how widespread this behavior became. See Finman & Macaulay, Freedom to Dissent: The Vietnam Protests and the Words of Public Officials, 1966 Wis. L. Rev. 632, 644-53.

[4] P.L. 89-152, 79 Stat. 586, Aug. 30, 1965.

served by the additional provision prohibiting destruction or mutilation.[5] The legislative history suggests none,[6] and the Second Circuit suggested none in *Miller*. To repeat our metaphor adopted by the Court in *Jarecki* v. *G. D. Searle & Co.*, 1961, 367 U.S. 303, 307, "If there is a big hole in the fence for the big cat, need there be a small hole for the small one?" *Cf. Coakley* v. *Postmaster of Boston*, 1 Cir., 3/16/67, F.2d

We see no possible interest, or reason, for passing a statute distinguishing between a registrant obligated to carry a card who mails it back to his draft board, *United States* v. *Kime*, *supra*, and one who puts it in his wastebasket. The significant fact in both of these instances is that he is not carrying it. The distinction appears when the destruction itself is an act of some consequence. It requires but little analysis to see that this occurs when, and only when, the destruction is, as in the case at bar, a witnessed event. We would be closing our eyes in the light of the prior law if we did not see on the face of the amendment that

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[5] During argument we inquired whether the pecuniary loss to the government by the destruction of a card might be a basis for the amendment. Defendant replied that the point had never been advanced. We find no statute in any other area making such negligible damage a felony. We cannot think that Congress believed the intrinsic value of a draft card to require this protection.

[6] We do not rely in this connection on the fact that the legislative history suggests an improper purpose, see *infra*, but merely note the absence of any proper one. We note, also, that the House Committee on Armed Services conceded that the prior law might "appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals." H.Rep. No. 747, 89th Cong., 1st Sess.

it was precisely directed[7] at public as distinguished from private destruction. In other words, a special offense was committed by persons such as the defendant who made a spectacle of their disobedience.

In singling out persons engaging in protest for special treatment the amendment strikes at the very core of what the First Amendment protects. It has long been beyond doubt that symbolic action may be protected speech.[8] Speech is, of course, subject to necessary regulation in the legitimate interests of the community, *Kovacs* v. *Cooper*, *infra*, but statutes that go beyond the protection of those interests to suppress expressions of dissent are insupportable. *E.g.*, *Cantwell* v. *Connecticut*, 1940, 310 U.S. 296, 307-11; *DeJonge* v. *Oregon*, 1937, 299 U.S. 353; *Terminiello* v. *Chicago*, 1949, 337 U.S. 1. We so find this one.

However, the defendant is not in the clear. In burning his certificate he not only contravened subsection (b)(3), but also subsection (b)(6). He knew this at the time of the burning, for his card summarized both provisions, and he knew it in a larger sense, as is revealed by the memorandum in support of his motion to dismiss, reproduced in his Record Appendix. The memorandum asserted,

> "To rely upon individuals having draft cards in their possession as a means of operative [sic] the selective service system would seem to be imprac-

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[7] While we make no attempt to divine the motive of any particular proponent of the legislation, we regard it as significant that the impact on certain expressions of dissent is no mere random accident, but quite obviously the product of design. *Cf. Grosjean* v. *American Press Co.*, 1936, 297 U.S. 233; *Gomillion* v. *Lightfoot*, 1960, 364 U.S. 339.

[8] *E.g.*, *West Virginia Board of Education* v. *Barnette*, 1943, 319 U.S. 624; *Stromberg* v. *California*, 1931, 283 U.S. 359.

> tical if not downright dangerous. . . . Whether Defendant O'Brien has his draft card in his possession, whether he burned, mutilated or whatever, will have little or no effect upon the selective service system."

It is apparent that the factual issue of nonpossession has been fully presented and tried and been found against the defendant. F.R.Crim.P. 31(c) provides, "The defendant may be found guilty of an offense necessarily included in the offense charged. . . ." See *United States* v. *Ciongole*, 3 Cir., 1966, 358 F.2d 439. We see no procedural reason why defendant should not stand convicted of this violation of section (b).

Nor do we see any constitutional objection to conviction for nonpossession of a certificate. It is one thing to say that a requirement that has no reasonable basis may impinge upon free speech. Different considerations arise when the statute has a proper purpose and the defendant merely invokes free speech as a reason for breaking it. We would agree, for example, that a provision relating to injury to the Capitol ornaments could not make it a heightened offense if statuary was defaced for the announced purpose of disparaging the individual memorialized. This, essentially, is what subsection (6) has done if its presence has influenced the court in the severity of the sentence, a matter we will come to shortly. However, it could hardly be suggested that free speech permitted defacement of a statue with impunity so long as disparagement was the declared motive. The First Amendment does not give the defendant carte blanche. *Cf. Kovacs* v. *Cooper*, 1949, 336 U.S. 77; *Giboney* v. *Empire Storage and Ice Co.*, 1949, 336 U.S. 490.

This leaves us with one reservation. Very possibly, in imposing sentence, the court took into consideration what the statute, by virtue of the amendment, indicated to be aggravating circumstances. Clearly it was an aggravated offense in the eyes of the proponents of the legislation. See remarks of Representative Rivers, Congressional Record, House, August 10, 1965, at 19135. Doubtless, too, the defendant chose his particular conduct precisely because of its "speaking" aspect. For the court to conclude, as was suggested in the legislative report, H.Rep. No. 747, 89th Cong., 1st Sess. 1-2, that the impact of such conduct would impede the war effort, and measure the sentence by the nature of his communication, would be to punish defendant, pro tanto, for exactly what the First Amendment protects. The only punishable conduct was the intentional failure to carry his card.[9]

While we do not have, and do not purport to exercise, jurisdiction to review a lawful sentence, we do hold that fairness to the defendant requires that he be resentenced upon considerations affirmatively divorced from impermissible factors. *Marano* v. *United States*, 1 Cir., 3/23/1967, F.2d . We remark, further, that any future indictments should be laid under subsection (b)(6) of the statute.

The judgment of conviction is affirmed and the case is remanded to the District Court to vacate the sentence, and to resentence as it may deem appropriate in the light of this opinion.

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[9] We do not, of course, suggest that if the defendant was urging others to burn their own cards this would have been protected speech. However, we do not understand the government to make this charge.

JUDGMENT

April 10, 1967

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of conviction is affirmed and the case is remanded to the District Court to vacate the sentence, and to resentence as it may deem appropriate in the light of the opinion filed today.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

Enter:
/s/ ALDRICH, Ch. J.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6813

DAVID PAUL O'BRIEN, DEFENDANT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
For the District of Massachusetts

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

ON PETITION FOR REHEARING

Marvin M. Karpatkin and *Howard S. Whiteside* on petition for rehearing.

April 28, 1967

ALDRICH, *Chief Judge*. Defendant's petition for rehearing makes, essentially, five points.

1. If one designated offense is constitutionally protected, there cannot be an included offense. Defendant cites but one case to support this contention. If it is pertinent at all, it is contrary to his position.

2. The petition at least implies that different consideration should be given to the defendant because he refused counsel in the district court. The court was, properly, most solicitious of the defendant, but it is unheard of that different legal principles became applicable because he chose to represent himself.

3. A distinction should be made between S.S.S. Form 110 (Notice of Classification) and S.S.S. Form 2 (Registration Certificate). Defendant suggests no reason for drawing a distinction, and we can think of none.

4. The "burning" of a card might leave enough card extant so that one still "possessed" the card, and 5. Defendant might have possessed a duplicate card. We might agree with defendant that, for either of these reasons, a burning in some circumstances would not violate the possession requirement. In the present case defendant was convicted under a charge that he did wilfully "mutilate, destroy and change . . ." his card. The conviction was fully supported. The government witnesses described the "charred remains" of the card as a "fragment." Defendant, who was fully advised of his Fifth and Sixth Amendment rights, acknowledged to the witnesses that he had burned "his" card, and permitted the fragment to be photographed. At trial he conceded the photograph's admissibility and "obvious" authenticity. We note, but without approval, defendant's present argument that he would still "possess" a card if it was "cut . . . in ten pieces." The photograph reveals a substantially incomplete card. Manifestly defendant no longer "possessed" that card.

Nor did defendant's own position permit the suggestion that what was burned was a duplicate of a card still in his possession. Defendant himself introduced and read to the jury his statement to his draft board that he could not "in good conscience carry what is called a draft card." Afterwards the court offered him probation if he would apply for and carry a card but he replied, "I couldn't in good conscience do that," and chose confinement instead. We will not, on such a record, grant rehearing to consider whether defendant was carrying a proper draft card in his possession.

Petition denied.

ORDER OF COURT

April 28, 1967

It is ordered that the petition for rehearing filed April 24, 1967, be, and the same hereby is denied.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

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